RECEIVED
MAR 26 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 79-5930

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980 79

ORIGINAL COPY

FREDERICK DOUGLAS BRAY,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

RESPONSE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA

DANNY K. SHADID
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405)521-3921

ATTORNEYS FOR RESPONDENT

October, 1980

INDEX

Subject Index

	Page
Jurisdiction	1
Issues Presented	1
Statement of the Case	2
Statement of the Facts	3
Argument	
I. THE EVIDENCE, WHEN TAKEN IN A LIGHT MOST FAVORABLE TO THE PROSECUTION, WAS SUFFICIENT TO ALLOW A RATIONAL TRIER OF FACT TO FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF AN INTENT TO ROB THE VICTIMS.	4
II. THE EVIDENCE, WHEN TAKEN IN A LIGHT MOST FAVORABLE TO THE PROSECUTION, WAS SUFFICIENT TO ALLOW A RATIONAL TRIER OF FACT TO FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF AN OVERT ACT IN FURTHERANCE OF THE CRIME OF ROBBERY WITH FIREARMS.	9
III. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY SUFFICIENTLY DEFINED THE OFFENSE OF "ATTEMPTED ROBBERY WITH FIREARMS."	11
Conclusion	13

Cases Cited

Becker v. State, 45 Okla.Crim. 350, 283 P. 796 (1929)	9,10
Bray v. Lash, (W.D. Okla., Case No. CIV-74-903-E, February 21, 1975)	3,8
Bray v. Lash, (10th Cir., Case No. 75-1269, August 20, 1975)	3,9
Bray v. Page, (W.D. Okla., Case No. 69-465, December 1, 1969)	2
Bray v. Page, 494 P.2d 339 (Okla.Crim. 1972)	2
Bray v. State, 450 P.2d 512 (Okla.Crim. 1969)	2
Bray v. State, 450 P.2d 515 (Okla.Crim. 1969)	2,8
Bray v. State, (Okla.Crim., Case No. PC-79-446, October 17, 1979)	3,9
Bray v. Wilson, (Okla.Crim. No. PC-74-519, August 13, 1974)	2
Cupp v. Naughten, 414 U.S. 141, 38 L.Ed.2d 368, 94 S.Ct. 396 (1973)	12

Page

Dunbar v. State, 75 Okla.Crim. 275, 131 P.2d 116 (1942) 10

Hankerson v. North Carolina, 432 U.S. 233, 53 L.Ed.2d 306, 97 S.Ct. 2339 (1977) . . . 5

Henderson v.Kibbee, 431 U.S. 145, 52 L.Ed.2d 203, 97 S.Ct. 1730 (1977) 11,12

In re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970) 5

Jackson v. Virginia, ____ U.S. ____, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979) 6,8,10,13

Johnson v. Louisiana, 406 U.S. 356, 32 L.Ed.2d 152, 92 S.Ct. 1620 (1972) 6

Luckey v. State, 529 P.2d 994 (Okla.Crim. 1974) 11

McCarty v. United States, 409 F.2d 793 (10th Cir. 1969), cert. denied, 396 U.S. 836, 24 L.Ed.2d 87, 90 S.Ct. 95 (1969) 8

Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975) 5

Oliver v. State, 568 P.2d 1327 (Okla.Crim. 1977) 11

Patterson v. New York, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2319 (1977) 5

Perry v. State, 594 P.2d 782 (Okla.Crim. 1979) 11

Taylor v. State, 96 Okla.Crim. 188, 251 P.2d 523 (1952) 10

United States v. Gordon, 580 F.2d 827 (5th Cir. 1978), cert. denied, ____ U.S. ____, 61 L.Ed.2d 305, 99 S.Ct. 731 (1979) . . . 8

United States v. Jackson, 560 F.2d 112 (2d Cir. 1977), cert. denied, 434 U.S. 941, 54 L.Ed.2d 301, 98 S.Ct. 434 (1977) . . . 10

United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114, 42 L.Ed.2d 812, 95 S.Ct. 792 (1975) . . . 10

United States v. White, 589 F.2d 1283 (5th Cir. 1979) 8

United States v. Young, 573 F.2d 1137 (9th Cir. 1978) 8

Weimer v. State, 556 P.2d 1020 (Okla.Crim. 1976) 6

Statutes Cited

Okla. Stat. tit. 21, § 44 (1971) 5

Okla. Stat. tit. 21, § 791 (1971) 5

Okla. Stat. tit. 21, § 801 (1971) 5

Page

Okla. Stat. tit. 22, § 11 (1971) 5

Okla. Stat. tit. 22, § 831 (1971) 11

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

FREDERICK DOUGLAS BRAY,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	No. 79-5930
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

RESPONSE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

COMES NOW the State of Oklahoma, by and through its attorneys, Jan Eric Cartwright, Attorney General of the State of Oklahoma, and Danny K. Shadid, Assistant Attorney General, and for Answer to the Petition for Writ of Certiorari submits to this Honorable Court the following brief in opposition thereto.

JURISDICTION

Petitioner seeks review pro se by way of Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals. On October 17, 1979, the aforesaid Court entered its Order affirming a denial of petitioner's Application For Post-Conviction Relief in the District Court of Oklahoma County, Oklahoma. Case No. PC-79-446. Said Order in effect affirmed the Judgment and Sentence rendered in Case No. 33558 (Oklahoma Court of Criminal Appeals No. A-14645).

ISSUES PRESENTED

1. Whether the evidence at trial, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt the existence of an intent to rob the victims.

2. Whether the evidence at trial, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt the existence of an overt act in furtherance of the crime of robbery with firearms.

3. Whether the trial court's instructions to the jury sufficiently defined the offense of Attempted Robbery With Firearms.

STATEMENT OF THE CASE

Petitioner was originally convicted in the District Court of Oklahoma County, State of Oklahoma, for the offense of Shooting With Intent to Kill and Attempted Robbery With Firearms, Case Nos. 33134 and 33558, respectively. For these offenses, petitioner was sentenced to terms of twenty (20) and ninety-nine (99) years imprisonment, respectively. These convictions were affirmed on direct appeal to the Oklahoma Court of Criminal Appeals and are reported as Bray v. State, 450 P.2d 512 (Okla.Crim. 1969) and Bray v. State, 450 P.2d 515 (Okla.Crim. 1969).

Thereafter, petitioner sought habeas corpus relief in the United States District Court for the Western District of Oklahoma regarding the attempted robbery conviction. Bray v. Page, (W.D. Okla., Case No. 69-465, December 1, 1969). Petitioner alleged a violation of the Double Jeopardy Clause. The Court dismissed the action due to failure to exhaust state remedies.

Petitioner then sought habeas corpus relief in the Oklahoma Court of Criminal Appeals alleging a violation of Okla. Stat. tit. 22, § 11 (1971) which provides that an act or omission which may be punishable in different ways under different statutes may be punishable under either provision. However, an offender can be punished under only one provision. The Oklahoma Court of Criminal Appeals, interpreting the Oklahoma statute to mean that a person cannot be punished twice for the same criminal transaction, granted habeas corpus relief in part by rendering null and void the conviction for Shooting With Intent To Kill. The Court, however, left in full force and effect the Judgment and Sentence in the robbery conviction. See Bray v. Page, 494 P.2d 339 (Okla.Crim. 1972).

Next, petitioner sought post-conviction relief in the Oklahoma Court of Criminal Appeals, alleging an insufficiency of the evidence to corroborate his accomplice's testimony. The Court denied relief on the basis of res judicata. Bray v. Wilson, (Okla.Crim. No. PC-74-519, August 13, 1974).

Petitioner again sought habeas corpus relief in the United States District Court for the Western District of Oklahoma alleging.

inter alia, an insufficiency of the evidence to support a conviction. The Court dismissed the action saying, in part, that issues of sufficiency of evidence do not present constitutional questions and could not be considered in a federal habeas corpus action. The Court did say, however, that it agreed with the Oklahoma Court of Criminal Appeals that the evidence "amply" supported the jury's verdict. Bray v. Lash, (W.D. Okla., Case No. CIV-74-903-E, February 21, 1975). Following the District Court's dismissal, petitioner appealed to the United States Court of Appeals for the Tenth Circuit which affirmed the lower court's decision. Bray v. Lash, (10th Cir., Case No. 75-1269, August 20, 1975).

Finally, petitioner sought post-conviction relief in the Oklahoma Court of Criminal Appeals. This time, petitioner claimed an insufficiency of the evidence to prove beyond a reasonable doubt every element of Attempted Robbery With Firearms. Citing its earlier opinion, the Court reiterated its position that there was "ample evidence to support the conviction." Bray v. State, (Okla.Crim., Case No. PC-79-446, October 17, 1979). From a denial of relief in the aforementioned action, petitioner now seeks a writ of certiorari to the Oklahoma Court of Criminal Appeals.

STATEMENT OF THE FACTS

On April 7, 1967, at approximately 5:30 a.m., Jack Ledford was driving a Safeway tractor-trailor truck north on Lindsay Street, in Oklahoma City, Oklahoma. Mr. Ledford was accompanied by Richard McFarland. As the pair approached the intersection of 10th Street and Lindsay, they noticed a car following them with its lights blinking. The car continued following the truck. Near the intersection of 24th Street and Lindsay, the car passed the truck and forced it to pull over to the curb (Tr. 22). Three black men were in the car. The man sitting next to the passenger door jumped out of the car and opened the truck door on the driver's side (Tr. 13, 22). At that point, the man, weilding a gun, told Ledford and McFarland to get out of the truck or he would kill them (Tr. 13, 22). Ledford refused, whereupon the man fired six shots, five of which struck Ledford in the mouth, neck, arm, elbow, and chest. The shots were fired from a range of two feet (Tr. 14). One of

the bullets passed through Ledford and struck McFarland (Tr. 22, 23). All the while, the assailant was repeatedly shouting, "Fall, you white son-of-a-bitch" (Tr. 14). The assailant was positively identified as the petitioner, Frederick Douglas Bray (Tr. 16, 23, 29, 33).

Additionally, State's Exhibit No. 1, a service revolver, was identified as a weapon similar in appearance to the weapon used by petitioner during the incident (Tr. 17, 26, 36). Harold Akerson, one of petitioner's companions on the morning in question, testified that immediately before the incident, the gun was in petitioner's pants (Tr. 32). Petitioner had told Akerson that he took the gun off of a policeman in Kansas City (Tr. 32, 33). Later, Robert Thornburg, a police officer in Kansas City, positively identified the weapon as one belonging to him and taken from him two weeks preceding the crime (Tr. 48). Officer Thornburg identified petitioner as the person who had taken the weapon from him (Tr. 49).

Akerson also testified that prior to the time petitioner got out of the car, petitioner said that he "was going rob them" (Tr. 33). Akerson later testified that petitioner had said something about getting some money from the truck drivers (Tr. 46, 47).

Following additional testimony regarding the automobile driven by the three black men and a paraffin test made on petitioner, the State rested. Thereupon, petitoner presented the testimony of Aaron Johnson, the third occupant of the car, who stated that he knew of no conversation about a robbery. Johnson did identify the gun used by petitioner (Tr. 72). Petitioner now claims that there was insufficient evidence to show the element of intent to rob.

ARGUMENT

I. THE EVIDENCE, WHEN TAKEN IN A LIGHT MOST FAVORABLE TO THE PROSECUTION, WAS SUFFICIENT TO ALLOW A RATIONAL TRIER OF FACT TO FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF AN INTENT TO ROB THE VICTIMS.

Petitioner alleges that the State of Oklahoma failed to prove beyond a reasonable doubt the element of "intent to rob" as one of the material elements of the crime of Attempted Robbery With Firearms. In support of his proposition, petitioner cites

Patterson v. New York, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2319 (1977), Hankerson v. North Carolina, 432 U.S. 233, 53 L.Ed.2d 306, 97 S.Ct. 2339 (1977), Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975), and In re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). Petitioner relies on these authorities as requiring the State to prove beyond a reasonable doubt each and every material element of the offense charged. While the State of Oklahoma notes that these cases deal with a possible shifting of the burden of proof in particular instances, the State will certainly agree that it bore the burden of proving beyond a reasonable doubt every material element of Attempted Robbery With Firearms in the present case.

The elements of robbery as defined by Oklahoma law are found in Okla. Stat. tit. 21, § 791 (1971) as follows:

> "Robbery is a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will accomplished by means of force or fear."

The added element of "with firearms," used to enhance punishment, is found in Okla. Stat. tit. 21, § 801 (1971). It may be worthy of note that Section 801 as it existed at the time of petitioner's trial varies from Section 801 as it presently exists, in that the former version included the death penalty as a possible punishment.

"Attempt" is defined by Oklahoma law in Okla. Stat. tit. 21, § 44 (1971) as follows:

> "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> "(a) purposely engaged in conduct which would constitute the crime if the attendant circumstances were as he believed them to be; or,
>
> "(b) when causing a particular result in an element of the crime, does anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part."

This statute has been interpreted by the Oklahoma Court of Criminal Appeals, as petitioner correctly points out, to require a showing of three material elements, i.e., (1) intent to commit

a specified crime, (2) performance of an overt act toward the commission of that crime, and (3) failure of consumation. Weimer v. State, 556 P.2d 1020 (Okla.Crim. 1976). Petitioner now argues that there was insufficient evidence to prove an intent to commit the specified crime of Robbery With Firearms.

Before looking to see whether there was sufficient evidence as a matter of law, we must first consider what standard to apply. This Court has recently established a new rule regarding this issue in the case of Jackson v. Virginia, ____ U.S. ____, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979). In Jackson, the majority held that (1) issues of sufficiency of the evidence were proper questions for review in federal habeas corpus actions and that (2) rather than looking to see if the record was devoid of any evidence supporting a conviction, federal courts must look to see if the evidence, when taken in a light most favorable to the prosecution, could allow any rational trier of fact to find beyond a reasonable doubt the existence of the material elements of the offense charged. The Court made clear that upon review of the evidence, the key question is not whether the reviewing judge believes the evidence proves the existence of the material element beyond a reasonable doubt, but rather, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in the original). 61 L.Ed.2d at 573, citing Johnson v. Louisiana, 406 U.S. 356, 32 L.Ed.2d 152, 92 S.Ct. 1620 (1972). The State of Oklahoma would emphasize the use of the word "could," leaving open the possibility of a rational trier of fact arriving at its factual finding.

Also important to note is that upon review, the evidence must be taken in a light most favorable to the prosecution. 61 L.Ed.2d at 573. Finally, the Court summarized its discussion of law saying habeas corpus relief should be granted "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 61 L.Ed.2d at 576, 577. Although Jackson grew out of a habeas corpus action, the State of Oklahoma will concede that the standard of review would be the same where a Petition for Certiorari is sought

upon a claim of insufficient evidence to prove guilt beyond a reasonable doubt.

Applying this standard of review to the present case, the question now becomes whether the evidence adduced at trial, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt the existence of petitioner's intent to commit a robbery with firearms. The State of Oklahoma submits that there was more than sufficient evidence. The trial transcript reflects the following testimony by Harold Akerson, one of petitioner's companions in the car:

> "Q. Now, prior to the time of getting out of the car, did Bray say anything as to what he was going to do?
>
> "A. Yes, he said that he was going to rob them." (Tr. 33).

Later, the following exchange occurred:

> "Q. Now then, as he got out of the car and after the car had, your car had stopped and the truck had stopped as you have stated here, did he say anything about getting any money or any property or anything?
>
> "BY MR. ANDERSON: Object to this as leading the witness.
>
> "BY THE COURT: Would the Reporter read the question.
>
> "(Reporter's Note: Whereupon the Reporter read back the last question.)
>
> "BY THE COURT: The objection will be overruled. The witness may answer if he recalls.
>
> "BY MR. ANDERSON: Note our exception.
>
> "BY THE COURT: Exception allowed. Go ahead and answer it.
>
> "BY MR. ANDERSON: Will the Reporter read the question back to the witness.
>
> "(Reporter's Note: Whereupon the Reporter again read the last question back.)
>
> "A. Yes, he did say something about getting some money.
>
> "Q. Where did he say he was going to get it?
>
> "A. From the two truck drivers." (Tr. 45, 46).

Finally, on recross examination, Mr. Akerson testified:

"A. I'm still not too sure about what was said when he got out of the car.

"Q. You are not too sure about the answer to the last question that the Reporter repeated to you, are you?

"A. Well, he did say something about getting some money or something.

"BY JUROR: I can't hear him.

"BY THE COURT: Would the Reporter read back the answer? Well, go ahead and re-answer the question.

"A. He did say something about getting some money." (Tr. 46, 47).

The State of Oklahoma will not deny that there were discrepancies between the testimony of Harold Akerson and Aaron Johnson. However, the State submits that any such discrepancies go to the weight and credibility of the testimony and that it is the jury's exclusive province to weigh the evidence in arriving at its factual determination. United States v. White, 589 F.2d 1283 (5th Cir. 1979); United States v. Gordon, 580 F.2d 827 (5th Cir. 1978), cert. denied, ____ U.S. ____, 61 L.Ed.2d 305, 99 S.Ct. 731 (1979); United States v. Young, 573 F.2d 1137 (9th Cir. 1978); McCarty v. United States, 409 F.2d 793 (10th Cir. 1969), cert. denied, 396 U.S. 836, 24 L.Ed.2d 87, 90 S.Ct. 95 (1969).

Additionally, the State of Oklahoma would show this Honorable Court that three courts have addressed the question of sufficiency of the evidence, albeit prior to the decision in Jackson, on four prior occasions. However, the State would emphasize that the language used by said courts reflect that there was not even a question of sufficiency of evidence. Originally on direct appeal, although the question was not directly presented at that time, the Oklahoma Court of Criminal Appeals concluded by saying that "the evidence amply supports the jury's verdict." (Emphasis in the original). Bray v. State, 450 P.2d at 516. Likewise, the United States District Court of Appeals for the Western District of Oklahoma, upon a direct allegation of insufficient evidence, stated at page 4 of its unpublished Order, "[w]e agree with the Oklahoma Court of Criminal Appeals 'that the evidence amply supports the jury's verdict.'" Bray v. Lash, (W.D. Okla., Case No. CIV-74-903-E, February 21, 1975). The Court of Appeals for the

Tenth Circuit, in turn, agreed with the District Court's conclusions in an unpublished Order affirming that court's decision. Bray v. Lash, (10th Cir., Case No. 75-1269, August 20, 1975). Finally, the Oklahoma Court of Criminal Appeals took the opportunity in petitioner's latest attempt to obtain post-conviction relief to affirm its earlier conclusion saying, "there was ample evidence to support the conviction." Bray v. State, (Okla.Crim., Case No. PC-79-446, October 17, 1979).

The State of Oklahoma submits that the aforementioned courts tend to agree that the evidence was more than sufficient to sustain the conviction. The State submits that the evidence, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a ressonable doubt the existence of petitioner's intent to rob Jack Ledford and Richard McFarland.

II. THE EVIDENCE, WHEN TAKEN IN A LIGHT MOST FAVORABLE TO THE PROSECUTION, WAS SUFFICIENT TO ALLOW A RATIONAL TRIER OF FACT TO FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF AN OVERT ACT IN FURTHERANCE OF THE CRIME OF ROBBERY WITH FIREARMS.

Petitioner also argues that there was not sufficient evidence to support a finding of an overt act toward the commission of a robbery. Petitioner relies on the facts that no personal property was actually taken and that he never actually demanded any money or property from the occupants of the truck. Petitioner's concept of what constitutes an overt act for purposes of an attempted offense is faulty.

The Oklahoma Court of Criminal Appeals has judicially defined "overt act," as that term is to be used in Oklahoma, in the case of Becker v. State, 45 Okla.Crim. 350, 283 P. 796 (1929). In that case, the Court adopted language from Corpus Juris, saying:

> "No definite rule, applicable to all cases, can be laid down as to what constitues an overt act or acts tending to accomplish a particular case. Each case must depend largely upon its particular facts and the inferences which the jury may reasonably draw therefrom. It is well settled, however, that something more than mere preparation or planning is essential. The accused must take at least one step beyond preparation by doing something directly moving toward and bringing him nearer the crime he intends to commit.

> In other words, while the act need not be the last approximate act to the consumation of the offense intended to be perpetrated, it must be such as will apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself." (Emphasis added). Becker v. State, supra, 283 P. at 801, quoting 16 Corpus Juris, p. 114.

Later, the Oklahoma Court of Criminal Appeals reiterated a definition employed in a previous case:

> "'[An] overt act is sufficient to complete offense of attempt to commit crime, if it goes far enough toward accomplishment of offense to amount to commencement of its consumation.'" (Emphasis added). Taylor v. State, 96 Okla.Crim. 188, 251 P.2d 523, 526 (1952), quoting Dunbar v. State, 75 Okla. Crim. 275, 131 P.2d 116 (1942).

The definition employed by the Oklahoma Court of Criminal Appeals is in accordance with the position taken by federal courts. See, e.g., United States v. Jackson, 560 F.2d 112 (2d Cir. 1977), cert. denied, 434 U.S. 941, 54 L.Ed.2d 301, 98 S.Ct. 434 (1977); United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114, 42 L.Ed.2d 812, 95 S.Ct. 792 (1975). Furthermore, the trial court in the instant case instructed the jury in accordance with the above-quoted definitions. The trial court stated in its Instruction No. 4:

> "You are further instructed that every person who attempts to commit the crime of ROBBERY WITH FIREARMS, as this crime has previously been defined, and in such attempt does any act toward the commission of such crime but fails or is prevented or is intercepted in the perpetration thereof is guilty of ATTEMPTED ROBBERY WITH FIREARMS." (Tr. 99).

Under the test for sufficiency of evidence in the constitutional sense as set forth in Jackson v. Virginia, supra, the question now becomes whether the evidence, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt the existence of an overt act by petitioner in furtherace of the crime of robbery with firearms.

The State of Oklahoma submits that there was evidence of numerous acts, any one of which would satisfy the definitional requirement. Most obvious of these are the shootings of Jack Ledford and Richard McFarland. Without question, such shootings are acts

beyond the "mere preparation" of the crime of robbery with firearms. The fact that the robbery was not consumated is irrelevant. The shootings were overt acts for purposes of establishing the offense of Attempted Robbery With Firearms.

There was also evidence that petitioner got out of the car in which he was riding and "jerked the door of the truck open" (Tr. 22). Grabbing the truck door was an overt act when viewed in context of the overall scene. Additionally, evidence of petitioner's act of pointing the weapon and simultaneously demanding that the occupants of the truck get out was sufficient to allow the jury to find such action to be an "overt act" within the meaning of Oklahoma's attempt statute.

An "overt act" need be any act, beyond mere preparation, toward the furtherance of a crime. The State of Oklahoma submits that the evidence, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt the existence of at least three distinct overt acts by petitioner in furtherance of the crime of robbery with firearms. Petitioner's claim is unfounded.

III. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY SUFFICIENTLY DEFINED THE OFFENSE OF "ATTEMPTED ROBBERY WITH FIREARMS."

Finally, petitioner claims that the trial court's instruction to the jury, specifically Instruction No. 4, did not sufficiently define "attempt." The pertinent portion of Instruction No. 4 has been quoted above and is found at pages 98 and 99 of the record.

In response, the State of Oklahoma would point out, initially, that any purported error regarding Instruction No. 4 or any omitted instructions has been waived due to petitioner's failure to object to Instruction No. 4 or to submit a specific instruction containing the subject matter which petitioner now claims was improperly omitted, as required by Oklahoma law. Okla. Stat. tit. 22, § 831 (1971); Perry v. State, 594 P.2d 782 (Okla.Crim. 1979); Oliver v. State, 568 P.2d 1327 (Okla.Crim. 1977); Luckey v. State, 529 P.2d 994 (Okla.Crim. 1974). This Honorable Court has said in Henderson v. Kibbee, 431 U.S. 145, 52 L.Ed.2d 203, 97 S.Ct. 1730 (1977):

> "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." 431 U.S. at 154.

In the present case, petitioner did not object to the content of Instruction No. 4. Nor did he submit an alternative instruction. Petitioner's sole objection regarding jury instructions was to Instruction No. 6 dealing with the subject of other crimes (Tr. 89, 90). Never did petitioner complain about the definition of "attempt." Petitioner has waived any such complaint.

However, the State of Oklahoma would further submit that Instruction No. 4, in conjunction with the entire set of instructions, properly defined "attempt" in accordance with the law presented above. Instruction No. 4 affirmatively informed the jury of the necessity of an overt act and a failure of consumation. Instruction No. 6 affirmatively informed the jury of the necessity of petitioner forming an intent to commit a robbery. Therefore, the three essential elements of "attempt" were all contained in the instructions.

Moreover, before petitioner can successfully claim constitutional error, he must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 38 L.Ed.2d 368, 94 S.Ct. 396 (1973). This position was reaffirmed in Henderson v. Kibbe, supra. However, in Henderson, this Court pointed out that when a criminal defendant claims error due to an omitted instruction, as petitioner apparently claims in part in the present case, the burden of showing prejudice is "especially heavy." 431 U.S. at 155. The State of Oklahoma submits that petitioner has not, and cannot, satisfy his burden of showing that the jury instructions as given denied him due process.

The State submits that (1) petitioner has waived any claim of error, (2) the jury instructions properly informed the jury as to the material elements constituting an attempt to commit robbery, and (3) petitioner has not shown that the jury instructions denied him due process. Petitioner's claim of error regarding jury instructions is without merit.

CONCLUSION

Under the standard for reviewing claims of insufficient evidence so as to deny a criminal defendant due process as set forth in Jackson v. Virginia, supra, the evidence, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt (1) the existence of an intent by petitioner to rob Jack Ledford and Richard McFarland, and (2) the existence of an overt act by petitioner in furtherance of the crime of robbery with firearms. Additionally, the trial court properly instructed the jury as to the material elements of an attempted crime. Petitioner has not made the requisite showing of erroneous instructions so as to constitute a denial of due process.

Finally, the State of Oklahoma submits that the findings of three other courts should be upheld. All three courts concluded that the evidence "amply" supported the jury's verdict. Wherefore, the State of Oklahoma respectfully urges this Honorable Court deny petitioner's request for writ of certiorari.

Respectfully submitted,

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA

DANNY K. SHADID
ASSISTANT ATTORNEY GENERAL
112 State Capitol Building
Oklahoma City, OK 73105
(405)521-3921

ATTORNEYS FOR RESPONDENT